

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KNOWLINGTON O. BURBAGE,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 04-133-SLR
)	
CITY OF WILMINGTON, MAYOR)	
JAMES BAKER, POLICE DEPARTMENT)	
OF WILMINGTON, DELAWARE,)	
CHIEF MICHAEL SZCZERBA,)	
UNKNOWN SERGEANT,)	
OFFICER LEARY, OFFICER MYERS,)	
)	
Defendants.)	

**DEFENDANTS CITY OF WILMINGTON, MAYOR JAMES BAKER, POLICE
DEPARTMENT OF WILMINGTON, CHIEF MICHAEL SZCZERBA AND
OFFICER JOSEPH LEARY’S MOTION FOR SUMMARY JUDGMENT
AND
DEFENDANT JAMES MYERS’ MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 4(m)**

For the reasons stated in the accompanying Opening Brief in Support of Defendants’ Motion for Summary Judgment and Motion to Dismiss pursuant to Fed. R. Civ. P. Civ. 4(m), and there being no disputed issues of material fact, Defendants City of Wilmington, Mayor James Baker, Police Department of Wilmington, Chief Michael Szczerba, Officer James Myers and Officer Joseph Leary hereby move this Honorable Court to issue an Order granting summary judgment in favor of the Defendants based on the following grounds:

1) Defendants are entitled to judgment as a matter of law with regard to Plaintiff’s §1983 action because the record is devoid of any evidence supporting Plaintiff’s allegation that the actions of Defendants Myers and Leary violated Plaintiff’s constitutional rights or that Defendant Myers “sexually assaulted” Plaintiff. Defendants possessed reasonable, articulable suspicion to stop

Plaintiff based upon the following facts: 1) the confidential informant, who was known to them personally, provided them with information that Plaintiff was his supplier of crack cocaine; 2) the confidential informant indicated that Plaintiff would be delivering a quarter ounce of crack cocaine to an unknown black male on June 21, 2002; 3) the confidential informant indicated that Plaintiff frequented the Cumberland Farms located on Miller Road; 4) the confidential informant described Plaintiff as a black male driving a red Plymouth Voyager bearing Delaware registration PC 47820; 5) the confidential informant advised that Plaintiff kept the crack cocaine on his person; 6) the confidential informant positively identified Plaintiff when Plaintiff entered the Cumberland Farms parking lot; and 7) through independent surveillance, Officer Chorlton identified Plaintiff's van pulling into the Cumberland Farms parking lot. Further, Defendant Myers, acting pursuant to a lawful stop and frisk, felt the crack cocaine in Plaintiff's pants. In accordance with the "plain touch doctrine," Defendant Myers had probable cause to reach into Plaintiff's pants and retrieve the contraband. As such, the actions of Defendants Myers and Leary do not constitute a violation of Plaintiff's constitutional rights.

2) Plaintiff fails to state a claim under §1983 against Defendants Myers and Leary because they are entitled to qualified immunity as a matter of law.

3) Plaintiff fails to state a claim under §1983 against Defendant City of Wilmington because Plaintiff fails to adduce any evidence that the City of Wilmington has a "negligent arresting policy" which permits "sexual assault" by its police officers.

4) Plaintiff fails to state a claim under §1983 against Defendant Wilmington Police Department because a municipal police department is not a "person" subject to suit under §1983.

5) Plaintiff fails to state a claim under §1983 against Defendants Mayor James Baker and Chief of Police Michael Szczerba because these Defendants cannot be held liable under §1983

solely on the basis of respondeat superior liability.

6) The Court must dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 37 (b)(2) because Plaintiff failed to comply with the Court's Order issued September 13, 2005 compelling Plaintiff to respond to Defendants' outstanding discovery in this matter.

7) The Court must dismiss all claims against Defendant Myers pursuant to Federal Rule of Civil Procedure 4(m) because Plaintiff has failed to serve Defendant Myers with the summons and Complaint in this matter.

WHEREFORE, Defendants City of Wilmington, Mayor James Baker, Police Department of Wilmington, Chief Michael Szczerba, Officer Myers and Officer Joseph Leary respectfully requests that the Court enter an order granting summary judgment in favor of Defendants and dismissing Plaintiff's Complaint with prejudice.

/s/ Rosamaria Tassone

Rosamaria Tassone, Esquire (I.D. #3546)

Assistant City Solicitor

Louis L. Redding City/County Building

800 N. French Street, 9th Floor

Wilmington, DE 19801

(302) 576-2175

Attorney for Defendants City of Wilmington,
Mayor James Baker, Police Department of
Wilmington, Chief Michael Szczerba, Officer
James Myers and Officer Joseph Leary

Date: March 24, 2006